# REVIEW IN THE SUPREME COURT OF THE UNITED STATES OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

THE jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is very far from that. Confusion has resulted from reading into the statute words which are not there.

The act of Congress gives the Supreme Court jurisdiction of appeals and writs of error (a) to review certain judgments of the District Court,[1] and (b) to review certain judgments of the Circuit Court of Appeals.[2]

To state these statutes without quoting them, they define the jurisdiction as follows (using the word "appeal" to include both appeals and writs of error):

By section 238 of the Judicial Code, direct appeals to the Supreme Court from the district courts may be taken (1) in any case in which the jurisdiction of the District Court is in issue where the jurisdictional question alone is certified to the Supreme Court; (2) from final sentences and decrees in prize causes; (3) in any case that involves the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

By section 128 of the Judicial Code, the Circuit Court of Appeals is given appellate jurisdiction over the district courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law"; and, except as provided in sections 239 and 240 (which sections provide

[1] Sec. 238, Judicial Code.

[2] Secs. 128 and 241, Judicial Code.

for *certiorari*), the judgments and decrees of the Circuit Court of Appeals are made final "in all cases in which the jurisdiction (*i. e.*, of the District Court) is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States"; excepting cases arising under the patent, copyright, revenue, and criminal laws, and admiralty cases.

By section 241 of the Judicial Code, all judgments or decrees of the Circuit Court of Appeals *not made final* by section 128 are reviewable in the Supreme Court by appeal or writ of error where the matter in controversy exceeds one thousand dollars, besides costs.

No appeal from the District Court to either appellate court depends on the amount involved.

*The first inquiry* is to determine what cases may or must go direct from the district courts to the Supreme Court. Passing questions of the jurisdiction of the District Court and prize causes, section 238 says that a case may go (the act does not say must go) direct to the Supreme Court which *involves* "the construction or application of the Constitution of the United States." The word "involves" is that used in the first clause, "is drawn in question" is the equivalent expression in the second clause, and "claimed to be in contravention of the Constitution" is the equivalent expression in the third clause. The act requires for direct appeal that there must be *actually involved or actually drawn in question* the Constitution or the validity or construction of a treaty. By the plain terms of the statute that is the test, and the ground on which the pleader rested the jurisdiction of the District Court is immaterial. The case may go direct if it actually involves the construction or application of the Constitution of the United States, no matter what was the ground of jurisdiction, and, no matter what the ground of jurisdiction, it cannot go direct if the Constitution of the United States or the construction or validity of a treaty is not actually involved.[3] Direct appeal lies where, to use the language of Mr. Justice Brandeis, "the writ of error presents a constitutional question substantial in character and properly raised below." [4]

[3] Ansbro *v.* United States, 159 U. S. 695, 697 (1895); Lampasas *v.* Bell, 180 U. S., 276, 282 (1901).

[4] Sugarman *v.* United States, 249 U. S. 182, and cases cited p. 184 (1919).

Nor does the act make it material whether the Constitution is the sole question involved or not. It is not required to be the sole question. Notwithstanding it is only one of a number of questions, the case with all its questions may be taken direct to the Supreme Court provided, and only provided, a constitutional or treaty question is involved.[5]

The language of the statute and the decisions of the Supreme Court establish these propositions:

1. A case grounded as to jurisdiction entirely on diverse citizenship, or entirely on an act of Congress, may nevertheless *involve* a constitutional question, and if so is appealable direct to the Supreme Court.

2. A case grounded as to jurisdiction entirely on the Constitution may be found to turn wholly on other questions and not really to involve the Constitution, and if so it cannot be appealed direct to the Supreme Court.

3. A case grounded as to jurisdiction upon the Constitution and also upon another ground is similarly appealable direct where it *involves* the Constitution of the United States; and otherwise it cannot be appealed direct regardless of the ground upon which the District Court took jurisdiction.

*The second inquiry* is to determine what cases may or must go from the district courts to the Circuit Court of Appeals, and this is to be determined by seciton 128 of the Judicial Code, which replaces section 6 of the act of March 3, 1891.

The language of this section providing for appeals to the Circuit Court of Appeals "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight," is open to two interpretations. It might have been contended that the words "cases other than those in which appeals and writs of error may be taken direct to the Supreme Court" had the effect to divide cases into two distinct classes, not overlapping each other: one class which must be taken by direct appeal to the Supreme Court, and another class which must be taken to the Circuit Court of Appeals. But that interpretation has been conclusively rejected, and it is now well settled that, generally speaking, cases which involve

[5] Sugarman *v.* United States, 249 U. S. 182 (1919).

constitutional questions are appealable at the option of the appellant either direct to the Supreme Court or to the Circuit Court of Appeals.[6] This has been decided in several cases where it has been held that two appeals or writs of error, one to the Supreme Court and the other to the Circuit Court of Appeals, cannot be prosecuted at the same time.[7] In the well-considered case of *Macfadden* v. *United States*,[8] which involved constitutional as well as other questions and which had been taken to the Circuit Court of Appeals and appealed from that court to the Supreme Court, the court said:[9]

"Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a writ of error might have been sued out originally directly from this court under clause 5.[10] But this was not done, and by the appeal to the Circuit Court of Appeals the right of direct appeal here was lost.[11]

"Section 6 of the act provides that the Circuit Courts of Appeal shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act,' and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the Circuit Court of Appeals of its jurisdiction.[12] In the case at bar the Circuit Court of Appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the Circuit Court of Appeals was final. The act contemplated that certain judgments of the Circuit Court of Appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in § 6 of the act. It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by § 5 of the act, is based upon the nature of

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[6] Macfadden *v.* United States, 213 U. S. 288 (1909); Lemke *v.* Farmers Grain Co. 42 Sup. Ct. Rep. 244 (1922).

[7] Macfadden *v.* United States, 213 U. S. 288 (1909); United States *v.* Jahn, 155 U. S. 109 (1894); Robinson *v.* Caldwell, 165 U. S. 359 (1897); Carter *v.* Roberts, 177 U. S. 496 (1900); Loeb *v.* Columbia Township Trustees, 179 U. S. 472 (1900); Boise Water Co. *v.* Boise City, 230 U. S. 84 (1913).

[8] 213 U. S. 288 (1909).

[9] *Ibid.*, p. 293.

[10] Loeb *v.* Columbia Township Trustees, 179 U. S. 472 (1900).

[11] Robinson *v.* Caldwell, 165 U. S. 359 (1897).

[12] American Sugar Co. *v.* New Orleans, 181 U. S. 277 (1901).

the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the Circuit Court or the District Court, whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*,[13] where it was said by the Chief Justice, citing cases, 'The jurisdiction referred to is the jurisdiction of the Circuit Court as originally invoked.' The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the Circuit Court of Appeals to this court, is important, and a neglect to observe it leads to confusion."

The same ruling was made in the latest case on the subject.[14]

*The third inquiry* is to determine what cases are appealable from the Circuit Court of Appeals to the Supreme Court. This is determined by sections 128 and 241 of the Judicial Code. Section 128 says that (excepting the remedy by *certiorari*) "the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States." Section 241 gives an appeal from the Circuit Court of Appeals to the Supreme Court in all cases in which the judgment of the Circuit Court of Appeals is not made final by the act, where the matter in controversy shall exceed one thousand dollars, besides costs. By the language of the statute and by well-considered decisions [15] the ground of jurisdiction of the District Court is immaterial as a test of appeal from that court, either direct to the Supreme Court or to the Circuit Court of Appeals. By the terms of the statute the test there is not the sources of jurisdiction of the trial court, but the nature of the questions actually involved in the case. If constitutional or treaty questions as defined in section 238 are actually involved, the case may go direct to the Supreme Court. But if it is appealed to the Circuit Court of Appeals, section 128 makes the judgment

[13] 184 U. S. 290 (1902).

[14] Lemke *v.* Farmers Grain Co., 42 Sup. Ct. Rep. 244 (1922).

[15] Macfadden *v.* United States, 213 U. S. 288 (1909).

of that court final where the jurisdiction of the District Court depended entirely upon citizenship of the parties. It will be observed that cases are appealable from the Circuit Court of Appeals to the Supreme Court if the jurisdiction of the District Court depended wholly or in part upon any federal question. It need not have been a constitutional question.

In spite of the caution of the court in *Macfadden* v. *United States* [16] that the difference between the test for determining whether a case is appealable from the trial court direct to the Supreme Court and the test for determining whether a case is appealable from the Circuit Court of Appeals to the Supreme Court is important and that neglect to observe it leads to confusion, the court itself in at least three cases seems to have been guilty of precisely this neglect and to have introduced the very confusion which it cautioned against in *Macfadden* v. *United States*.[17]

In *Union & Planters' Bank* v. *Memphis*,[18] a case where jurisdiction of the Circuit Court was grounded entirely on the Constitution but which had been appealed to the Circuit Court of Appeals and came from that court to the Supreme Court, Chief Justice Fuller said:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals."

Substantially the same language was repeated by Chief Justice White in *Raton Water Works Co.* v. *City of Raton*,[19] and similar expressions were used by Mr. Justice Day in *Lemke* v. *Farmers Grain Co.*[20]

In *Lemke* v. *Farmers Grain Co.*[21] Mr. Justice Day says that when the *jurisdiction of the District Court* rests *solely* upon attack upon a state statute because of its alleged violation of the federal Constitution, a direct appeal to the Supreme Court *is the only method of review;* and that where the jurisdiction of the District Court is invoked upon other federal grounds as well as attack on the consti-

[16] 213 U. S. 288 (1909).
[17] *Ibid.*
[18] 189 U. S. 71, 73 (1903).
[19] 249 U. S. 552 (1919).
[20] 42 Sup. Ct. Rep. 244 (1922).
[21] *Ibid.*

tutionality of a state statute, an appeal may be taken to the Circuit Court of Appeals. The court there took jurisdiction to review the judgment of the Circuit Court of Appeals in a case which involved a constitutional question, assigning as a reason that the *jurisdiction of the District Court* was rested on other grounds as well as the Constitution.

As before shown, the language of the statute is that a direct appeal to the Supreme Court lies in all cases which *involve* the construction or application of the Constitution, and these cases are those which actually present a constitutional question. The grounds of jurisdiction of the District Court are not made a test by the statute and are immaterial.

Nor does the statute distinguish between cases where the sole question is one of the Constitution and cases involving other questions as well. For direct appeal what the statute requires is that the case shall involve some constitutional question.

Mr. Justice Day's statement in the next sentence, that where *jurisdiction is invoked* upon other federal grounds as well as constitutional grounds an appeal may be taken to the Circuit Court of Appeals with ultimate review in the Supreme Court, involves the same inaccuracy, *i. e.*, that the question of direct appeal to the Supreme Court, or appeal to the Circuit Court of Appeals, depends in any respect on the grounds on which the jurisdiction of the District Court was invoked. It is well settled that the federal courts are not confined in deciding cases to the grounds of jurisdiction alleged in the bill. For example, in a suit which plaintiff has grounded as to jurisdiction on the Constitution of the United States every other question arising in the case, although not growing out of the Constitution, may nevertheless be decided.[22] Accurate statement is that where a case *involves* a constitutional question and also other questions, appeal will lie either to the Supreme Court or to the Circuit Court of Appeals regardless of the grounds of jurisdiction of the District Court; with an appeal from the Circuit Court of Appeals provided the jurisdiction of the District Court was invoked wholly or in part because of a *federal* question, constitutional or

[22] Davis *v.* Wallace, 42 Sup. Ct. Rep. 164 (1922); Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 620 (1904); Siler *v.* Louisville & Nashville R. R. Co., 213 U. S. 175, 191 (1909); Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298, 303 (1913); Greene *v.* Louisville & Interurban R. R. Co., 244 U. S. 499, 508 (1917).

otherwise. Why is this principle less applicable to a case involving a sole constitutional question than to cases involving that question plus others? If cases involving a constitutional question plus other questions are appealable to either court but not to both, why is this less true of cases involving a constitutional question alone? Nothing in the statute suggests any such distinction. Both kinds of cases are appealable solely because a constitutional question is involved. The distinction made by Chief Justice Fuller in *Union & Planters' Bank* v. *Memphis*,[23] by Chief Justice White in *Raton Water Works Co.* v. *City of Raton*,[24] and by Mr. Justice Day in *Lemke* v. *Farmers Grain Co.*,[25] is between cases where the jurisdiction of the District Court was invoked solely on a constitutional ground and cases where it was invoked on such a ground plus others, or solely on other grounds. But this is a bad distinction, for according to the language of the statute the ground of jurisdiction of the District Court has nothing to do with the case, being material only to determine what appeals will lie from the Circuit Court of Appeals to the Supreme Court.

In the three cases last cited the court seems to have applied as the test to determine appealability from the District Court a test not contained in the statute touching that subject, a test borrowed from a statute touching an entirely different subject, *viz.*, determining what cases are appealable from the Circuit Court of Appeals to the Supreme Court; the very fallacy the court so clearly pointed out in *Macfadden* v. *United States*. The grounds of jurisdiction of the District Court are nowhere referred to in the relevant statutes otherwise than as determining what judgments of the Circuit Court of Appeals are final.

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[23] 189 U. S. 71 (1903).
[24] 249 U. S. 552 (1919).
[25] 42 Sup. Ct. Rep. 244 (1922).